Supreme Court, U.S.
FILED

981085 JAN 5 - 1999

OFFICE OF THE CLERK

No. _____

In The

Supreme Court of the United States

October Term, 1998

ASHOK K. GUMBHIR,

Petitioner,

vs.

THE CURATORS OF THE UNIVERSITY OF MISSOURI, ROBERT W. PIEPHO AND R. LEE EVANS,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

KELLY L. MCCLELLAND
(Counsel of Record)
JOHN KIRKLIN
CONWAY L. HAWN
(On the Petition)
MCCLELLAND LAW FIRM, P.C.
The Flagship Building
200 Westwoods Drive
Liberty, Missouri 64068-1170
(816) 781-0002

Attorneys for Petitioner Ashok K. Gumbhir

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

52 pp

QUESTIONS PRESENTED

1. Did the Eighth Circuit Court of Appeals properly abandon this Court's accepted lodestar approach to calculating a reasonable federal statutory attorney's fee award, in a case in which the petitioner recovered significant monetary damages, in favor of a billing judgment or proportionality approach that is keyed to the monetary recovery that the plaintiff's attorney purportedly could have reasonably expected to obtain at the outset of the representation?

2. Did the Eighth Circuit Court of Appeals properly deny altogether, without any explanation or analysis, petitioner's application for a reasonable award of Title VII appellate attorney's fees and costs for his successful defense of each and every issue appealed by the respondents' in this case?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

OPINIONS BELOW 1

BASIS FOR JURISDICTION 2

STATUTE INVOLVED 2

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE PETITION 7

THE COURT SHOULD RESOLVE THE CONFLICT AMONG THE COURTS OF APPEALS AND WITH THE PRECEDENTS OF THIS COURT CONCERNING THE CALCULATION OF REASONABLE STATUTORY ATTORNEY'S FEE AWARDS FOR PREVAILING PARTIES AWARDED MORE THAN NOMINAL DAMAGES 7

THE COURT SHOULD REVERSE THE EIGHTH CIRCUIT'S COMPLETE DENIAL OF APPELLATE ATTORNEY'S FEES AND COSTS, WITHOUT EXPLANATION, FOR PETITIONER'S SUCCESSFUL DEFENSE OF EACH AND EVERY ISSUE APPEALED BY THE RESPONDENTS IN THIS CASE 23

CONCLUSION 25

TABLE OF AUTHORITIES

Page

CASES CITED:

Adams v. Rivera, 13 F.Supp.2d 550 (S.D.N.Y. 1998) 19

Abrams v. Lightolier, Inc., 50 F.3d 1204 (3d Cir. 1995) 13

Alexander v. Gerhardt Enters., Inc., 40 F.3d 187 (7th Cir. 1994) 16

Blanchard v. Bergeron, 489 U.S. 87 (1989) 7

Building Serv. Local 47 Cleaning Contractors v. Grandview, 46 F.3d 1392 (6th Cir. 1995) 14

Carroll v. Wolpoff & Abramson, 53 F.3d 626 (4th Cir. 1995) 13, 14

Chalmers v. City of L.A., 796 F.2d 1205 (9th Cir. 1986) 24

City of Burlington v. Dague, 112 S.Ct. 2638 (1992) 22

City of Riverside v. Rivera, 477 U.S. 561 (1986) 9, 10, 18, 25

Connolly v. National School Bus Service, Inc., 992 F.Supp. 1032 (N.D. Ill. 1998) 18

Copeland v. Marshall, 641 F.2d 880 (D.C. Cir. 1980) 21

Cullens v. Department of Transportation, 29 F.3d 1489 (11th Cir. 1994) 18

Cullens v. Georgia Department of Transportation, 827 F.Supp. 756 (M.D. Ga. 1993) 17

Duckworth v. Whisenant, 97 F.3d 1393 (11th Cir. 1996) 18

TABLE OF AUTHORITIES – Continued

Page

Dunlap-McCuller v. Riese Org., 980 F.2d 153 (2d Cir. 1992) 13

Estate of Borst v. O'Brien, 979 F.2d 511 (7th Cir. 1992) 17

Farrar v. Hobby, 506 U.S. 103 (1992) ..... *passim*

Hensley v. Eckerhart, 461 U.S. 424 (1983) ...7, 21, 22, 24, 25

Hyde v. Small, 123 F.3d 583 (7th Cir. 1997).....15, 16

Jaffee v. Redmond, 142 F.3d 409 (7th Cir. 1988) 16

Johnson v. Eaton, 80 F.3d 148 (5th Cir. 1996) 14

Johnson v. Georgia Highway Express, Inc., 488 F.2d 714 (5th Cir. 1974) 21

Kimbrew v. Evansville Police Department, 867 F.Supp. 818 (S.D. Ind. 1994) 19

Krewson v. City of Quincy, 74 F.3d 15 (1996) 10

McDonnell v. Miller Oil Co., Inc., 134 F.3d 638 (4th Cir. 1998) 13

McKenzie v. Cooper, Levins & Pastko, Inc., 990 F.2d 1183 (11th Cir. 1993) 18

Migis v. Pearle Vision, Inc., 135 F.3d 1041 (5th Cir. 1998) 14

Morales v. City of San Rafael, 96 F.3d 359 (9th Cir. 1996) 17

Morimanno v. Taco Bell, 979 F.Supp. 791 (N.D. Ind. 1997) 19

Morris v. City of Atlanta, 861 F.Supp. 1079 (N.D. Ga. 1993) 20

TABLE OF AUTHORITIES – Continued

Page

Newhouse v. McCormick & Co., 130 F.3d 302 (8th Cir. 1997) 24

Orchano v. Advanced Recovery, Inc., 107 F.3d 94 (2d Cir. 1997) 12

Patterson v. Johnson, 790 F.2d 712 (8th Cir. 1986)..... 24

Pennsylvania v. Delaware Valley Citizens' Council for Clean Air, 478 U.S. 546 (1986).....8, 21

Purtle v. Eldridge Auto Sales, 91 F.3d 797 (6th Cir. 1996)..... 15

Quaratino v. Tiffany & Co., 129 F.3d 702 (2d Cir. 1997).....11, 12

Rainey v. Philadelphia Housing Authority, 832 F.Supp. 127 (E.D. Pa. 1993) 20

Rodriguez-Hernandez v. Miranda-Velez, 132 F.3d 848 (1st Cir. 1998) 10

Simpson v. Sheahan, 104 F.3d 998 (7th Cir. 1997) 16

Stacy v. Stroud, 845 F.Supp. 1135 (S.D. W.Va. 1993) 19

TCI of Illinois, Inc., v. Carpenter, 849 F.Supp. 326 (N.D. Ill. 1994) 20

Trevino v. Gates, 888 F.Supp. 1509 (C.D. Cal. 1995) 19

Washington v. Philadelphia County Court of Common Pleas, 89 F.3d 1031 (3d Cir. 1996) 13

STATUTES CITED:

28 U.S.C. § 1254(1) 2

28 U.S.C. § 1291..... 7

28 U.S.C. § 1331..... 7

TABLE OF AUTHORITIES – Continued

Page

28 U.S.C. § 1343(a) 7

28 U.S.C. § 1367 7

42 U.S.C. § 1983 3

42 U.S.C. § 1988 ..... 8, 9, 16, 18, 21

42 U.S.C. § 2000e-5(k) 2, 8, 9, 21

COURT RULES CITED:

Fed. R. App. P. 39 7

OPINIONS BELOW

Petitioner, Ashok K. Gumbhir, respectfully prays that a writ of certiorari issue to review (1) the decision and order of the United States Court of Appeals for the Eighth Circuit filed on October 7, 1998, that replaced this Court's accepted lodestar approach to calculating the award of statutory attorney's fees and costs with the billing judgment or proportionality approach, and (2) the order of the Eighth Circuit Court of Appeals filed on November 13, 1998, completely denying, without explanation, petitioner's request for an award of reasonable appellate attorney's fees and costs for his successful defense of each and every issue appealed by the respondents in this case.

The decision and order of the Eighth Circuit filed October 7, 1998, is reported at 157 F.3d 1141 (8th Cir. 1998). This decision is reproduced in the Appendices to this Petition beginning at App. 1. The pertinent judgment and order of the district court that was reviewed by the Eighth Circuit in this case is unreported, and is reproduced in the Appendices to this Petition beginning at App. 13.

The order of the Eighth Circuit completely denying petitioner's application for an award of appellate attorney's fees and costs for the successful defense of his merits victory in the district court is unreported, and is reproduced in the Appendixes to this Petition beginning at App. 12. The Eighth Circuit's unreported order denying the Petition for Rehearing and Suggestion for Rehearing En Banc of that decision was issued on December 28, 1998, and is reproduced in the Appendices to this Petition at App. 19.

BASIS FOR JURISDICTION

The Eighth Circuit's decision and order concerning the district court's award of statutory attorney's fees in this case was filed on October 7, 1998. The Eighth Circuit's order denying petitioner's application for appellate attorney's fees and costs was filed on November 13, 1998. The Eighth Circuit's order denying petitioner's Petition for Rehearing and Suggestion for Rehearing En Banc of its November 13, 1998, order was filed on December 28, 1998.

The statutory provision conferring jurisdiction on this Court to review the Eighth Circuit's decision and orders by Writ of Certiorari is 28 U.S.C. Sec. 1254(1).

STATUTE INVOLVED

The petitioner's application for an award of statutory attorney's fees for prevailing on the merits in the district court and for an award of appellate attorney's fees for successfully defending on appeal his merits victory in the district court were made pursuant to the fee-shifting provision of Title VII of the 1964 Civil Rights Act, 42 U.S.C. Sec. 2000e-5(k), which provides that:

> **(k) Attorney's fee; liability of Commission and United States for costs**
>
> In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee (including expert fees) as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.

STATEMENT OF THE CASE

Petitioner instituted this action against The Curators of the University of Missouri, Robert W. Piepho, and R. Lee Evans under Title VII of the Civil Rights Act of 1964, as amended ("Title VII"), the Age Discrimination in Employment Act ("ADEA"), the Americans with Disabilities Act ("ADA"), 42 U.S.C. Sec. 1983, and state law asserting claims of employment discrimination, violation of his First Amendment rights in the workplace, and defamation. Petitioner succeeded on his Title VII retaliation claim and ultimately was awarded $4,432.20 in lost wages and benefits and $4,432.20 in a prospective salary increase. As the prevailing party in the litigation, petitioner applied in the district court for an award of Title VII statutory attorney's fees of $458,263.57, representing a ten percent (10%) reduction of the initial fee request to account for the district court's finding of partial success in the case, together with a request for $46,576.98 in recoverable costs.

The attorney's fees and costs requested by the petitioner were a direct result of the Stalingrad defense conducted by the respondents throughout the litigation of the case, including the respondents' vigorous attempts to retrieve through costly evidentiary hearings purported attorney-client privileged documents that they had at first voluntarily released to the petitioner. Moreover, the attorney's fees and costs requested by the petitioner were unfortunately exacerbated by a mistrial and the subsequent recusal by the first district court judge in this case.

Nonetheless, despite these extenuating circumstances of which the petitioner had no control, the district court

filed a decision on October 22, 1997, and granted petitioner only $110,000.00 in attorney's fees and $15,000.00 in costs, reasoning, among other things, that petitioner's attorneys expended some unnecessary hours on the litigation. However, the district court failed to provide any explanation as to how the alleged deficiencies translated into the particular attorney's fee awarded, which represented only twenty-four percent (24%) of the fee the petitioner requested, even after a self-imposed ten percent (10%) reduction.

On appeal, the Eighth Circuit, in a decision filed on October 7, 1998, and reported at 157 F.3d 1141 (8th Cir. 1998), further reduced the attorney's fee awarded by the district court to a mere $46,750.00, only slightly more than ten percent (10%) of the adjusted fee requested by the petitioner, while upholding the costs award of $15,000.00. The Eighth Circuit reached this result by completely abandoning the traditional and presumptively correct lodestar amount of reasonably expended hours times reasonable hourly rates in favor of a highly subjective billing judgment or proportionality approach keyed to the amount of money damages petitioner's attorney purportedly might have expected to recover at the outset of the litigation. The Eighth Circuit rationalized this new approach to determining reasonable statutory attorney's fee awards as follows:

> In determining what hours were reasonably expended in this case, the district court properly examined whether particular claimed hours were unreasonable and the question of limited success. But it overlooked another aspect of reasonableness – the question whether the

> requested fee award when based upon hours allegedly expended exceeds the amount that could ever be reasonable for a case of this nature.

(App. at 9). Application of this non-lodestar based billing judgment or proportionality approach to the quantification of a reasonable statutory attorney's fee in this case led the Eighth Circuit along what can only be characterized as a convoluted, tortured path of subjective and impressionistic reasoning in arriving at a "reasonable" fee award that contrasts dramatically with the simplicity, logic, and ease of administration of the lodestar approach.

The Eighth Circuit, beginning with the observation that the petitioner's counsel asked the jury for lost salary damages of $20,832.00 and an additional unspecified amount for emotional distress, proceeded by *tour de force* to the arbitrary and simplistic conclusion that "counsel knew from the outset that this case involved only a relatively modest claim for compensatory damages, perhaps $50,000.00 to $75,000.00 at most." (App. at 9). Then, without any analysis of the elements or aspects of the litigation that might legitimately have accounted for the number of hours expended by petitioner's counsel on the litigation and the concomitant size of the fee request (such as the strenuousness of the resistance put up by the respondents' in opposing petitioner's legal claims), the Eighth Circuit stated that "it was not reasonable for an attorney to run up a bill of $450,000.00 to $500,000.00 to litigate this type of damage claim," and proceeded from there to the arbitrary, inexplicable conclusion that "if the jury in this case had awarded Gumbhir *the full amount* he

requested in closing argument, a reasonable fee could not have exceeded $110,000.00, the amount awarded by the district court for Gumbhir's far more limited success." *Id.*

In a footnote, however, the Eighth Circuit conceded the possibility "that the case as framed by Gumbhir could not have been effectively litigated to a fully tried conclusion for this amount of attorney time." (App. at 10, n.1). Nevertheless, the Eighth Circuit, without analysis, apparent reflection or any attempt at squaring its reasoning with the traditional lodestar approach to fee calculation mandated by this Court, simply concluded that "competent attorneys are adept at finding ways of litigating cases so that the time expended is reasonably related to the amount at issue," or, alternatively, that the underlying dispute between the parties was trivial and personal and somehow should have been resolved without resort to the courts at all. *Id.* The Eighth Circuit went on to state that "[i]f an award of $110,000.00 would have been appropriate had Gumbhir been fully successful, the actual award must be substantially reduced because of his very limited success." (App. at 10). The Eighth Circuit therefore haphazardly imposed a pro rata reduction of 42.5 percent – the relationship between the $8,846.40 petitioner recovered in damages and the $20,832.00 in lost salary damages he requested – on the $110,000.00 that the court adjudged the case was "worth" even at best, yielding an attorney's fee award of $46,750.00, together with the $15,000.00 in costs awarded by the district court. (App. at 11).

Thereafter, petitioner moved for an award of reasonable statutory attorney's fees and costs for successfully

defending on appeal the retaliation verdict and compensatory damages award that he had won in the district court. Cryptically, and without any explanation, the Eighth Circuit flatly denied the request *in toto*, in a three-line decision dated November 13, 1998, stating simply that "[a]fter consideration of the court, appellee's motions for an award of costs pursuant to F.R.A.P. 39 and for an award of attorneys' fees are denied." (App. at 12).

The jurisdiction of the district court was invoked under 28 U.S.C. Secs. 1331, 1343(a), and 1367. The jurisdiction of the Eighth Circuit was invoked under 28 U.S.C. Sec. 1291.

REASONS FOR GRANTING THE PETITION

THE COURT SHOULD RESOLVE THE CONFLICT AMONG THE COURTS OF APPEALS AND WITH THE PRECEDENTS OF THIS COURT CONCERNING THE CALCULATION OF REASONABLE STATUTORY ATTORNEY'S FEE AWARDS FOR PREVAILING PARTIES AWARDED MORE THAN NOMINAL DAMAGES

In this case, the Eighth Circuit forthrightly abandoned the lodestar approach to determining a reasonable attorney's fee award to the prevailing party pursuant to federal fee-shifting statutes. The Eighth Circuit's decision circumvents this Court's prior holdings that the starting point for the determination of a reasonable attorney's fee award is the calculation of the lodestar amount. *See Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983). The lodestar approach has been described by this Court as "the centerpiece of attorney's fee awards." *Blanchard v. Bergeron*, 489 U.S. 87 (1989). Nevertheless, the Eighth Circuit has now

substituted for the lodestar approach a rule, appropriately termed the "billing judgment" or "proportionality" rule, by which a requested statutory fee is adjudged "reasonable" only if it is rationally related or proportional, in the highly subjective opinion of the deciding court, to the monetary recovery that the plaintiff's attorney purportedly could have anticipated the case would yield at the outset of the representation.

Applying this new approach to statutory fee quantification, the Eighth Circuit awarded petitioner a statutory attorney's fee far below the amount that would have been yielded by application of the lodestar approach, based on an assertedly "overlooked . . . aspect of reasonableness – the question whether the requested fee award when based upon hours allegedly expended exceeds the amount that could ever be reasonable for a case of this nature." (App. at 9). Thus, this case presents the highly important question (one that has produced disparate outcomes among federal district courts and appellate circuits and which collides headlong with the established statutory attorney's fee precedent of this Court) concerning the degree to which there continues to exist a "strong presumption" that the lodestar approach represents a reasonable attorney's fee award under federal fee-shifting statutes such as 42 U.S.C. Sec. 1988 and 42 U.S.C. Sec. 2000e-5(k). *See Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546, 565 (1986).

The only exception to the lodestar presumption is in the narrow band of cases in which, under the principle established in *Farrar v. Hobby*, 506 U.S. 103 (1992), the plaintiff recovers only a nominal damage award, and no compensatory damages. In only those limited circumstances may the lodestar approach be disregarded and,

instead, no attorney's fees or a low fee be awarded. *Id.* The Eighth Circuit in the case at hand has now attempted to expand the exceptions to the use of the lodestar approach by its use of the so-called billing judgment or proportionality approach.

The Eighth Circuit's new approach to determine a statutory attorney's fee award, however, is in direct conflict with this Court's ruling in *City of Riverside v. Rivera*, 477 U.S. 561 (1986), that neither the contingent fee model utilized in private tort litigation nor a rule of proportionality between the statutory attorney's fee and the amount of money damages recovered by the plaintiff is appropriately applied in the determination of reasonable statutory attorney's fees pursuant to 42 U.S.C. Sec. 1988, 42 U.S.C. Sec. 2000e-5(k), and other similarly worded federal fee-shifting statutes.

Since this Court's decision in *Farrar v. Hobby* was rendered, vast confusion has pervaded the lower courts concerning how to apply that decision, with some courts extending the fee-nullification or fee-limitation principles of *Farrar* beyond the case in which the plaintiff has recovered only nominal damages and no compensatory damages to the case, as here, where the plaintiff has recovered compensatory monetary damages in a significant albeit relatively modest amount. The crucial question presented by the instant case is whether the lodestar approach may properly be abandoned and replaced by what has been termed the billing judgment or proportionality approach, in cases in which the plaintiff, as here, has recovered significant compensatory money damages and not merely, as in *Farrar* itself, only nominal damages in light of this Court's decision in *Rivera* broadly disapproving of

a strict rule of proportionality between the attorney's fee award and the plaintiff's money damage award.

The lower district courts and appellate circuits are sharply divided on this question and have provided different answers that require this Court's authoritative resolution of the issue. The First, Second, Third, Seventh, Ninth, and Eleventh Circuits have calculated statutory attorney's fee awards on the basis of the lodestar approach in cases of small monetary recoveries. The Fifth Circuit Court of Appeals has generated inconsistent decisions concerning whether a non-lodestar approach is appropriate in calculating a statutory fee award in cases in which the plaintiffs have won only small or modest damage awards. The Fourth Circuit, like the Eighth Circuit in the instant case, has approved the granting of a low statutory fee award in cases of modest damage recoveries without employing the lodestar methodology. Accordingly, as dramatically demonstrated by a more complete discussion of these conflicting precedents below, there is an urgent need for this Court to assume jurisdiction over the instant case that squarely frames the issue of whether this Court's precedents permit a non-lodestar calculated attorney's fee award that is artificially made proportional to a modest damage award in a case.

The First Circuit in *Rodriguez-Hernandez v. Miranda-Velez*, 132 F.3d 848, 859 (1st Cir. 1998), stated generally, citing *Rivera*, that "[w]hile it is true that plaintiff's fee request was more than twice the damages awarded, the Supreme Court has held that the size of the verdict does not bar the recovery of large attorney's fees awards." Similarly, in *Krewson v. City of Quincy*, 74 F.3d 15, 18 (1996), the court, again citing *Rivera*, held that "courts in

this circuit have held that in federal civil rights cases a fee award is not limited by the size of the recovery but may, in appropriate circumstances, greatly exceed it," including cases of small damage recoveries by the plaintiff.

In *Quaratino v. Tiffany & Co.* 129 F.3d 702 (2d Cir. 1997), the Second Circuit Court of Appeals, in a case in which the plaintiff recovered a total of $158,145.00 in compensatory and punitive damages on her Title VII retaliation claim, reviewed the district court's decision not to award the plaintiff the calculated lodestar fee award of $124,645.18 and instead to award fees in the amount of one-half of the plaintiff's money damages recovered, or $79,072.50, under the so-called "billing judgment" approach. Under the billing judgment approach applied by the district court, "an attorney's requested fee would be judged 'reasonable' if it were rationally related to the monetary recovery that the attorney could have anticipated *ex ante*," so that the district court "would have had Quaratino's attorney estimate *ex ante* the total possible financial recovery in the case (the court forecast a 'very generous' maximum of $200,000.00), discount that amount for the 'substantial' risk of no recovery, and proceed to expend time on the case only up to the time value of an appropriate fraction of that expected recovery." 129 F.3d at 707. This is precisely the rationale that was adopted by the Eighth Circuit in artificially capping the maximum possible statutory fee recovery in *Gumbhir*, based upon the reasoning that the district court there should have taken into account "the question whether the requested fee award when based on hours allegedly expended exceeds the amount that could ever be reasonable for a case of this nature." (App. at 9).

The Second Circuit panel in *Quaratino* rejected the district court's billing judgment approach, stating that were it to adopt that approach, "wherein an attorney would dedicate time to a civil rights case only in proportion to the expected monetary relief," it would contravene that court's own prior precedents as well as the legislative intent of fee-shifting statutes in civil rights litigation "by relinking the effectiveness of a civil rights plaintiff's legal representation to the dollar value of her claim." 129 F.3d at 707. The Second Circuit panel also found that the district court's billing judgment approach was not saved by its "proposed exception, which would allow fees out of line with monetary recovery in 'a case where a new legal principle of importance in the field of civil rights' or an 'issue[ ] . . . of overarching societal importance' is involved. [citation omitted]." *Id.* The Second Circuit panel explained that "[c]ongress enacted fee-shifting statutes to compensate 'private attorney[s] general' and thereby to encourage private enforcement of civil rights statutes, to the benefit of the public as a whole," and that the "public interest in private civil rights enforcement is not limited to those cases that push the legal envelope; it is perhaps most meaningfully served by the day-to-day private enforcement of these rights, which secures compliance and deters future violations." *Id.* Finally, the Second Circuit panel made clear its position that the fee-limiting or fee-nullifying principles of *Farrar v. Hobby* are "limited to the context where the plaintiff only nominally 'wins' at trial – which is just the circumstance in which this Court has since applied it." *Id.* at 708. *See, e.g., Orchano v. Advanced Recovery, Inc.*, 107 F.3d 94, 100 (2d Cir. 1997) ("We do not regard *Farrar* as

altering the requirement that the district court calculate a lodestar and make findings explaining its adjustments to that figure where the jury has found that the plaintiff suffered actual injury and awarded him compensation for that injury."); *Dunlap-McCuller v. Riese Org.*, 980 F.2d 153, 160 (2d Cir. 1992) (observing that "this Court has consistently rejected the notion that an award of attorney's fees be proportional to the amount of damages recovered").

The Third Circuit in *Washington v. Philadelphia County Court of Common Pleas*, 89 F.3d 1031, 1041-42 (3d Cir. 1996), reiterated that "a court may not diminish counsel fees in a section 1983 action to maintain some relation between the fees and the damages awarded." *See also Abrams v. Lightolier, Inc.*, 50 F.3d 1204, 1222 (3d Cir. 1995) (concluding that the accepted principle that the fee award may exceed the plaintiff's damage award was not abrogated by *Farrar*, interpreted as applying a non-lodestar fee approach only to cases in which nominal damages are recovered by the plaintiff).

By contrast, the Fourth Circuit in *Carroll v. Wolpoff & Abramson*, 53 F.3d 626 (4th Cir. 1995), invoking *Farrar*, declined to approve a statutory fee in the lodestar amount in a case of a small monetary recovery and upheld a nominal fee award of $500 for the plaintiff who won $50 in statutory damages under the Fair Debt Collection Act. In rejecting the need to calculate the fee based on the lodestar approach, the Fourth Circuit held that "it was entirely proper for the district court to view as the salient measure of her success in the underlying litigation the small amount of damages she recovered from the opposing party for its technical statutory violation." *Id.* at 630. Subsequently, in *McDonnell v. Miller Oil Co., Inc.*, 134

F.3d 638, 641 (4th Cir. 1998), the Fourth Circuit, citing *Carroll* approvingly, stated bluntly that "[i]n accounting for the plaintiff's limited success, a court should examine 'the size of the proposed attorney's fee . . . award in comparison with the total damage award.' [citation omitted]"

The Fifth Circuit has not spoken with a single voice concerning the propriety of abandoning a lodestar-calculated statutory attorney's fee award in a case in which small or modest money damages have been recovered by the plaintiff. Thus, in *Johnson v. Eaton*, 80 F.3d 148 (5th Cir. 1996), the Fifth Circuit approved a lodestar-calculated fee award for the plaintiff who recovered $500 in punitive damages for defendant's violations of the Fair Debt Collection Practices Act after requesting only $4,000 in damages, distinguishing *Farrar* as a case involving the recovery of only nominal damages of one dollar after demanding $17 million from the defendants. *Id.* at 152. On the other hand, more recently, in *Migris v. Pearle Vision, Inc.*, 135 F.3d 1041, 1048 (5th Cir. 1998), the Fifth Circuit ruled that the district court had abused its discretion in awarding Title VII fees "over six and one-half times the amount of damages awarded," in this case damages of $12,233.32, noting also that the plaintiff "sought over twenty-six times the damages actually awarded," and concluding that "these ratios are simply too large to allow the fee award to stand."

The Sixth Circuit in *Building Serv. Local 47 Cleaning Contractors v. Grandview*, 46 F.3d 1392, 1402 (6th Cir. 1995), adopted the rule in ERISA cases, as in civil rights cases, that "there is no requirement that the amount of an award of attorney's fees [there $70,185.95] be proportional to the

amount of the underlying award of damages [there $25,598.91]." In *Purtle v. Eldridge Auto Sales*, 92 F.3d 797, 802 (6th Cir. 1996), the Sixth Circuit sustained a lodestar-calculated attorney's fee award of $5,444.05 for the plaintiff's recovery of $1,000 in statutory damages under the Truth in Lending Act, stating that "[t]he attorney's fees are not limited by the amount of Purtle's recovery."

In *Hyde v. Small*, 123 F.3d 583 (7th Cir. 1997), the Seventh Circuit, in an opinion authored by Chief Judge Posner, presented an eloquent disquisition opposing departure from the use of the ordinary lodestar approach to calculating a statutory attorney's fee award in cases involving "routine" constitutional violations and small damages recoveries. In that case, $500 in compensatory damages for the defendant police officers' unconstitutional false arrest of the plaintiff. Chief Judge Posner began by observing that since in *Farrar* the plaintiff obtained only nominal damages of one dollar, "[f]rom a practical standpoint it was as if Farrar had lost, in which event, the law was and is clear, he could not obtain any award of fees." *Id.* at 584-85. Chief Judge Posner proceeded to explain why a lodestar-calculated fee should be awarded in a case finding a "routine" constitutional violation and providing only a small money damages recovery:

> The district court based its decision to award no fees on the small size of the verdict and the fact that the case broke no new ground in the law of police misconduct that, although unconstitutional, is neither harmful enough to support a large award of compensatory damages nor malicious enough to justify an award of punitive damages is, as practical matter, beyond the

> reach of the law. It is impossible, unless there is an expectation of a fee award (and often not then), to interest a competent lawyer in bringing a suit in federal court to recover a small amount of damages unless the plaintiff is a rich person willing to finance the suit out of his own pocket rather than by means of a contingent fee contract, the normal way in which tort suits are financed in this country. Yet the cumulative effect of petty violations of the Constitution arising out of the interactions between the police (and other public officers) and the citizenry on the values protected by the Constitution may not be petty, and if this is right, then the mere fact that a suit does not result in a large award of damages or the breaking of new constitutional ground is not a good ground for refusing to award any attorney's fees.

Id. at 585.

At the same time, Chief Judge Posner acknowledged that this reasoning was in tension with the result in *Simpson v. Sheahan*, 104 F.3d 998, 1001 (7th Cir. 1997), where a Seventh Circuit panel upheld the district court's use of a "non-lodestar, *Farrar*-type of analysis" in awarding a "low" § 1988 fee award to the plaintiff who won a $140 money damages award that was "minimal in damages sought." Most Seventh Circuit decisions, however, are in accord with the principles articulated in *Hyde*. *See Jaffee v. Redmond*, 142 F.3d 409, 417 n.3 (7th Cir. 1988) (stating generally, citing *Rivera*, that the "seeming disproportion between the fees sought by Jaffee's attorney's and the damages awarded to Jaffee is, standing alone, not dispositive"); *Alexander v. Gerhard Enters., Inc.*, 40 F.3d 187, 194 (7th Cir. 1994) (upholding a $59,580.87 Title VII

fee award when the plaintiff recovered only $10,000 in back wages); *Estate of Borst v. O'Brien*, 979 F.2d 511, 516-17 (7th Cir. 1992) (upholding a § 1988 fee award 47 times greater than the damage award in an excessive police force case, observing that "[w]e have repeatedly held . . . that an attorney's fee award need not be proportionate to the damage recovery for his suspension by the defendant sheriff without due process, noting that "Section 1988 helps to discourage petty larceny").

The Ninth Circuit in *Morales v. City of San Rafael*, 96 F.3d 359 (9th Cir. 1996), reversed the district court's award of an arbitrarily low statutory fee in a case in which the plaintiff recovered $17,500 in compensatory damages, noting that the district court was "[s]eemingly trying to avoid a figure 'too much more' than the damages award," "[i]nstead of following the practice courts are generally required to follow when calculating attorney's fees in civil rights cases – i.e. computing a lodestar figure and then, if necessary, making adjustments to that figure based upon reasonableness factors." *Id.* at 362. In so ruling, the Ninth Circuit confined *Farrar* to its holding, namely, "that 'nominal damages' cases in which the relief is de minimis are exempted from the general requirements that govern the calculation of attorney's fees, including the requirement that a lodestar first be calculated." *Id.*

In *Cullens v. Georgia Department of Transportation*, 827 F.Supp. 756, 763-65 (M.D. Ga. 1993), the district court limited the plaintiffs' non-lodestar calculated fee award to three times the value of their underlying monetary recovery of no more than $13,000, relying on an interpretation of *Farrar* as seeming "to signal a shift in

emphasis by the Supreme Court from a pure vindication model for assessing the value of the services of a private attorney general, toward a 'value added' model," which "invites a cost benefit analysis" and "encourages an attorney to proportion the effort to the size of the compensable wrong." The Eleventh Circuit reversed, ruling that "[u]se of the multiplier as a sole or dominant criterion is inconsistent with the Supreme Court's rejection of proportionality of damages as a basis for a fee award." *Cullens v. Department of Transportation*, 29 F.3d 1489, 1493-94 (11th Cir. 1994). In *McKenzie v. Cooper, Levins & Pastko, Inc.*, 990 F.2d 1183, 1185 (11th Cir. 1993), the court, although with some misgivings, upheld a lodestar-calculated Title VII fee award of nearly $100,000 in a case in which the plaintiff's recovery was $9,000. The court in *Duckworth v. Whisenant*, 97 F.3d 1397, n.3 (11th Cir. 1996), citing *Rivera*, stated that the law does not permit "award of fees under § 1988 based upon a pure proportion of the amount of the civil rights plaintiff's recovery," observing further that "[n]either would such a calculation be appropriate in light of the importance of Plaintiff's perseverance in this litigation, which may be credited with forcing a needed examination of the disciplinary process in the DeKalb County Sheriff's Office."

District court decisions as well are divided in their treatment of the question of whether the lodestar approach may be discarded and a low or no statutory attorney's fee awarded in cases in which the monetary damage recovery is low or modest and the lodestar-calculated fee would be significantly greater than the damages recovered. *Compare Connolly v. National School Bus Service, Inc.*, 992 F.Supp. 1032, 1036 (N.D. Ill. 1998)

(lodestar method applied where, although $10,000 settlement amount was "moderate, it was not tremendously out of proportion to the demand and it is above the nominal amounts courts have considered *de minimis*"); *Morimanno v. Taco Bell*, 979 F.Supp. 791, 795 (N.D. Ind. 1997) (court concludes that it need not reach the Farrar analysis at all because the compensatory damages awards to the plaintiffs totalling $10,300 are not nominal, and therefore the lodestar approach to fee calculation should be applied); *Trevino v. Gates*, 888 F.Supp. 1509, 1516 (C.D. Cal. 1995) (concluding that plaintiff who recovered a low award of $1 in compensatory damages and $9,109 in punitive damages in police excessive force case was entitled to a lodestar-calculated fee award because of the public policy and deterrence implications of the verdict); *Stacy v. Stroud*, 845 F.Supp. 1135, 1139 (S.D. W.Va. 1993) (utilizing lodestar approach in calculating statutory attorney's fee award where plaintiff's recovery of more than $4,000 in damages for prison officials' deliberate indifference to his medical needs "cannot be characterized as technical, nominal, or *de minimis*" and the suit implicated important public concerns) *with Adams v. Rivera*, 13 F.Supp.2d 550, 552-53 (S.D.N.Y. 1998) (concluding that plaintiff's " 'victory' does not qualify for an award of attorney's fees," "when '[p]laintiff sought nearly $1.5 million in compensatory and punitive damages and received only $1,080 in compensatory damages, an amount that cannot be considered 'significant' on any fair analysis of this case"); *Kimbrew v. Evansville Police Department*, 867 F.Supp. 818, 831-32 (S.D. Ind. 1994) (denying all statutory attorney's fees under *Farrar* to plaintiff who obtained $1 in nominal damages and $2,500 in punitive damages for

defendant police officers' Fourth Amendment violations when plaintiff "sought only to redress a private wrong"); *Morris v. City of Atlanta*, 861 F.Supp. 1079, 1084-85 (N.D. Ga. 1993) (denying attorney's fees to plaintiff who recovered small damages award of $157 and sought much more in damages and equitable relief and did not vindicate an important public purpose, so that the victory was only *de minimis* within the meaning of *Farrar*); *TCI of Illinois, Inc. v. Carpenter*, 849 F.Supp. 326, 327-28 (N.D. Ill. 1994) (awarding only low, non-lodestar calculated attorney's fees of three times the amount of the low damages award of $420 obtained by the plaintiff cable television company, noting that although the plaintiff's damages recovery "may not be 'nominal damages' in the absolute sense of a token recovery, it is certainly nominal in relation to the financial sights . . . set . . . in bringing this action"); *Rainey v. Philadelphia Housing Authority*, 832 F.Supp. 127, 131 (E.D. Pa. 1993) (reducing the plaintiff's lodestar fee by 60 percent, citing *Farrar*, when plaintiff recovered only $3,072 in money damages, finding that it was not reasonable "for counsel to be awarded a lodestar more than four times the sum of his client's actual recovery").

In light of these confusing, contradictory and inconsistent holdings, it is important for this Court to review the decision of the Eighth Circuit in this case both because of the split among, and sometimes within, the circuit courts on the question of whether the lodestar approach may be replaced in cases of modest damages award recoveries by the new billing judgment or proportionality approach – an approach that conflicts with existing statutory fee precedents of this Court. The Eighth

Circuit's approach in this case substitutes for the predictability and uniformity of the lodestar approach a methodology, as dramatically illustrated by the Eighth Circuit's analysis in this case, that is highly subjective, arbitrary, and impressionistic.

The legislative history of 42 U.S.C. § 1988, 42 U.S.C. § 2000e-5(k), and other similarly worded federal fee-shifting statutes that authorize the award of a "reasonable attorney's fee" to the prevailing party in the litigation provides little guidance concerning the proper standards for quantifying the amount of a reasonable fee, referring only to the twelve (12) factors enunciated in *Johnson v. Georgia Highway Express, Inc.* 488 F.2d 714, 717-19 (5th Cir. 1974). However, the unquantified *Johnson* approach proved to be less than satisfactory, because, as observed by one court, "[s]imply to articulate those twelve factors . . . does not itself conjure up a reasonable dollar figure in the mind of the district judge. A formula is necessary to translate the relevant factors into terms of dollars and cents." *Copeland v. Marshall*, 641 F.2d 880, 890 (D.C. Cir. 1980) (*en banc*). This Court itself noted that the " 'major fault' of the *Johnson* analysis" "was that it gave very little actual guidance to District Courts." *Pennsylvania v. Delaware Valley Citizens' Council*, 478 U.S. 546, 563-564 (1986).

The same fault and lack of clear guidance inheres in the highly subjective and impressionistic billing judgment or proportionality approach adopted by the Eighth Circuit in this case, when it is utilized to replace the lodestar method that this Court unequivocally adopted in *Hensley v. Eckerhart*, 461 U.S. 424 (1983), as the acceptable

and reliable methodology for calculating reasonable statutory attorney's fee awards. Since adopting the lodestar methodology as a predictable and easily administered approach to calculating reasonable statutory attorney's fees, this Court has emphasized that the "lodestar figure has . . . become the guiding light of our fee-shifting jurisprudence" and that there exists a "strong presumption that the lodestar represents the 'reasonable' fee," noting the "interest in ready administrability that has underlain our adoption of the lodestar approach . . . and the related interest in avoiding burdensome satellite litigation." *City of Burlington v. Dague*, 112 S.Ct. 2638, 2643, 2644 (1992). These highly valued virtues of the lodestar approach are dissipated when it is replaced, as the Eighth Circuit has done in this case, by the billing judgment or proportionality approach in cases where the plaintiff has won more than mere nominal damages, with the inevitable effect of making "the setting of fees more complex and arbitrary, hence more unpredictable, and hence more litigable." *Id.* at 2643 (referring in that case to the use of contingency enhancements to the lodestar figure).

Finally, in reducing the petitioner's fee award for partial success through the utilization of a "pro rata reduction[ ] based upon the relationship between damages requested and damages awarded," 157 F.3d at 1147, the Eighth Circuit flouted the principle established by this Court in *Hensley v. Eckerhart*, 461 U.S. 424, 435 n.11 (1983), rejecting as a methodology for reducing the lodestar amount for the prevailing plaintiff's partial success in the litigation a "mathematical approach," akin to the approach employed in this case, "comparing the total

number of issues in the case with those actually prevailed upon."

Accordingly, for the reasons set forth above, this Court should assume jurisdiction over this case and correct the Eighth Circuit's flawed and unwarranted approach to calculating a reasonable statutory attorney's fees and ultimately reverse and remand the Eighth Circuit's October 7, 1998 decision to require a recalculation of attorney's fees and costs in this action consistent with this Court's lodestar approach to calculating statutory attorney's fees.

THE COURT SHOULD REVERSE THE EIGHTH CIRCUIT'S COMPLETE DENIAL OF APPELLATE ATTORNEY'S FEES AND COSTS, WITHOUT EXPLANATION, FOR PETITIONER'S SUCCESSFUL DEFENSE OF EACH AND EVERY ISSUE APPEALED BY THE RESPONDENTS IN THIS CASE

After finding that certain contentions raised on appeal by the respondents were "frivolous," the Eighth Circuit contradictorily denied the petitioner's application for attorney's fees and costs incurred in successfully defending against the respondents' numerous appeals (App. at 4 and 12). In denying altogether petitioner's application for an award of reasonable appellate attorney's fees for his successful defense of each of the respondents' appeals of the petitioner's favorable merits judgment and compensatory damages award in the district court, without any explanation or analysis whatsoever, the Eighth Circuit violated basic principles that are well-established in jurisprudence of awarding statutory attorney's fees for successfully defending *in toto* on

appeal a favorable merits judgment won in the district court. These same principles require that an adequate explanation be provided by the court for its determination of a statutory fee award, or, as in this case, the denial of all fees.

It is well-settled that the plaintiff-appellee who has established his prevailing party status in the district court by winning a favorable judgment on the merits, as did the petitioner here by obtaining a verdict that the respondents unlawfully retaliated against him in violation of Title VII and the recovery of more than $8,000 in compensatory damages for back pay and a prospective salary increase, who then successfully defends that favorable judgment on appeal, is entitled to an award of reasonable statutory attorney's fees for the work of his counsel on the appeal. *See e.g., Newhouse v. McCormick & Co.*, 130 F.3d 302, 304 (8th Cir. 1997); *Chalmers v. City of L.A.*, 796 F.2d 1205, 1213 (9th Cir. 1986); *Patterson v. Johnson*, 790 F.2d 712, 713 (8th Cir. 1986). It is equally firmly established that a court's reduction, or as here denial of a request for statutory attorney's fees is subject to reversal and remand if the court fails "to provide a concise but clear explanation of its reasons for the fee award." *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983). The Eighth Circuit in this case failed to conform to either of these clear requirements its decision denying, without any explanation, all appellate attorney's fees to petitioner for his completely successful defense on appeal of his merits victory in the district court. Therefore, this Court should grant certiorari on this question and reverse and remand the Eighth Circuit's November 13, 1998 order with directions that it make a

reasonable appellate attorney's fee award and provide an explanation for the resulting award.

CONCLUSION

The decision by the Eighth Circuit in this action is in direct conflict with not only decisions in other courts of appeals, but also with this Court's decision in *City of Riverside v. Rivera*, 477 U.S. 561 (1986). Granting this Petition would allow this Court the opportunity to resolve the conflicting decisions rendered by the courts of appeals regarding the propriety of abandoning the lodestar approach in cases in which the plaintiff has recovered more than merely nominal money damages, in favor of a highly subjective approach that sets a statutory fee award based on principles of proportionality that, as in this case, is substantially less than the amount that would have been yielded by the reasonable-hours-times-reasonable-rates lodestar methodology. Moreover, by granting this Petition, the Court would have the opportunity to correct the inconsistency with this Court's *Hensley v. Eckerhart*, 461 U.S. 424 (1983) decision created by the Eighth Circuit's complete denial, without explanation, of all appellate attorney's fees to the petitioner who successfully defended each and every issue appealed by the respondents in this action. Accordingly, for the reasons set forth herein, the petitioner respectfully prays that this Court grant this Petition for Writ of Certiorari, and ultimately reverse the decisions rendered by the Eighth Circuit at issue herein and remand such decision to the

Eighth Circuit for reconsideration in light of this Court's findings.

Respectfully submitted,

KELLY L. MCCLELLAND
(*Counsel of Record*)
JOHN KIRKLIN
CONWAY L. HAWN
(*On the Petition*)
MCCLELLAND LAW FIRM, P.C.
The Flagship Building
200 Westwoods Drive
Liberty, Missouri 64068-1170
(816) 781-0002

Attorneys for Petitioner,
Ashok K. Gumbhir

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

Nos. 97-3066; 97-3122; 97-3832;
97-4221; 97-4369; 97-4370

Ashok K. Gumbhir, Plaintiff-Appellee/ Cross-Appellant, v. Curators of the University of Missouri, Defendant-Appellant/ Cross-Appellee, Robert W. Piepho; R. Lee Evans, Cross-Appellees.	*	Appeals from the United States District Court for the Western District of Missouri

---

Submitted: May 14, 1998
Filed: October 7, 1998

Before BEAM, LOKEN, and MURPHY, Circuit Judges.

LOKEN, Circuit Judge.

After years of bitter feuding within the University of Missouri at Kansas City's School of Pharmacy (UMKC),

Professor Ashok Gumbhir commenced this action against UMKC, Pharmacy Dean Robert Piepho, and Professor R. Lee Evans, alleging employment discrimination, violation of Gumbhir's First Amendment rights in the work place, and defamation. The district court granted summary judgment dismissing Gumbhir's defamation and § 1983 First Amendment claims. After a trial, the jury returned a verdict for UMKC on Gumbhir's claims of race, national origin, and disability discrimination. The jury awarded Gumbhir $4,432.20 in lost wages and benefits on his Title VII retaliation claim, and the court entered judgment on this verdict. Gumbhir then moved for sweeping injunctive relief, prospective equitable monetary relief, and an award of $535,000 in attorneys' fees and costs. The court denied injunctive relief, granted a prospective salary increase of $4,432.20 consistent with the jury's verdict, and awarded $110,000 in attorneys' fees. Both sides appeal. We reduce the award of attorneys' fees and otherwise affirm.

I. The Jury's Finding of Retaliation Discrimination.

The jury found that Gumbhir was the victim of unlawful retaliation and awarded him $4,423.20 in "lost wages and benefits through the date of this verdict." On appeal, UMKC argues it is entitled to judgment as a matter of law on this claim. We view the evidence in the light most favorable to the jury's verdict, giving Gumbhir as prevailing party the benefit of all inferences that may reasonably be drawn from that evidence. *See Kim v. Nash Finch Co.*, 123 F.3d 1046, 1057-58 (8th Cir. 1997).

The lengthy trial exposed a rather incredible sequence of petty, venomous exchanges between the main protagonists, Professor Gumbhir on the one hand, and Dean Piepho and Professor Evans on the other, an unprofessional spate of communications that would not be tolerated in a well-functioning work place and that should have been beneath the dignity and intelligence of the seemingly well-educated combatants. On appeal, UMKC's opening brief spends twenty pages marshalling this distasteful evidence to show that Gumbhir was the villain, while Gumbhir's opening brief responds with twenty-five pages intended to paint Piepho, Evans, and other UMKC supervisors as the black hats. Most of this is irrelevant to the issues on appeal, a waste of our time and a strong indication the case has been massively over-lawyered. We will spare the reader a tedious review of these background facts and move directly to the evidence we view as critical to Gumbhir's claim of unlawful retaliation.

A claim of retaliation discrimination requires proof that the employee engaged in protected activity, that the employer took adverse employment action against him, and that there was a causal connection between the two. *See Kempcke v. Monsanto Co.*, 132 F.3d 442, 445 (8th Cir. 1998). Beginning in December 1991, an otherwise disgruntled Gumbhir made a series of complaints to Piepho and the Vice Provost of Affirmative Action about ethnic slurs by Evans, about an Associate Dean's unfavorable comment concerning immigrants working in the United States, and about what Gumbhir perceived as a racially biased environment in the School of Pharmacy. Gumbhir received substantially below average salary increases the

next three times the School of Pharmacy gave such increases. UMKC argues Gumbhir's complaints about ethnic discrimination were not protected activity, and denying him salary increases was not adverse employment action. These contentions are frivolous. *See Davis v. City of Sioux City*, 115 F.3d 1365, 1369 (8th Cir. 1997); *Smith v. St. Louis University*, 109 F.3d 1261, 1266 (8th Cir. 1997).

The critical issue is whether there was sufficient evidence of a causal connection between Gumbhir's protected activity of complaining about racial and ethnic discrimination, and UMKC's adverse salary actions. The district court properly instructed the jury that to prove his claim of unlawful retaliation, Gumbhir "must prove by the greater weight of the evidence that [UMKC] took action against plaintiff for exercising his rights to object to race or national origin or disability discrimination." The sufficiency issue is close because UMKC presented strong evidence of legitimate non-discriminatory reasons for its salary actions. But giving the verdict the deference to which it is entitled, we conclude the evidence was sufficient to permit the jury reasonably to infer that UMKC's adverse salary actions were motivated at least in part by an intent to retaliate for Gumbhir's protected activity. Accordingly, the district court's judgment on the jury verdict dated May 15, 1997, must be affirmed.

II. The Grant of a Prospective Salary Increase.

The district court granted Gumbhir equitable relief in the form of a prospective pay increase of $4,423.20, an amount equal to the back pay the jury awarded to the

date of its verdict. It is often appropriate to grant a prospective salary adjustment, or some other form of "front pay," in an employment discrimination case. We review the grant or denial of such equitable relief under the abuse of discretion standard. *See Newhouse v. McCormick & Co.*, 110 F.3d 635, 643 (8th Cir. 1997).

At trial, UMKC sought to introduce evidence that Gumbhir double-billed the University for certain consulting trips, behaved inappropriately to female students, and secretly managed an HMO in Texas. The district court excluded this evidence. On appeal, UMKC does not challenge these evidentiary rulings. Instead, it argues the court abused its discretion by awarding Gumbhir equitable relief without considering this evidence of employee wrongdoing and unclean hands, citing *McKennon v. Nashville Banner Publishing Company*, 513 U.S. 352, 361 (1995), and *Gibson v. Mohawk Rubber Company*, 695 F.2d 1093 (8th Cir. 1982). We disagree. While those opinions stress the importance of considering all relevant circumstances in awarding equitable relief, including employee wrongdoing, neither case involved evidence that had been excluded at trial. Indeed, our decision in *Gibson* emphasized that a post-trial decision regarding equitable relief may not be based upon findings that conflict with those made by the jury. 695 F.2d at 1101. Thus, the district court did not abuse its discretion in declining to consider in fashioning equitable relief evidence it had excluded from the jury's consideration at trial. The award of a prospective salary increase is consistent with the jury's back pay verdict and must be affirmed.

III. The Dismissal of Gumbhir's § 1983 Claims.

Count III of the fifty-one-page Third Amended Complaint asserted claims under 42 U.S.C. § 1983 against UMKC and the individual defendants. One claim is that defendants violated Gumbhir's First Amendment rights by punishing him for opposing unlawful discrimination and speaking out on matters of general academic concern. The district court granted summary judgment dismissing Count III. On appeal, Gumbhir argues that genuine issues of material fact preclude summary judgment on his First Amendment § 1983 claim. We review the grant of summary judgment de novo.

It is well settled that UMKC "cannot condition public employment on a basis that infringes the employee's constitutionally protected interest in freedom of expression." *Connick v. Myers*, 461 U.S. 138, 142 (1983). The district court concluded Gumbhir had not spoken out on matters of public concern; that if he did it was to denigrate his academic colleagues, not to benefit the public; and that he presented no evidence his criticism of Piepho and Evans was a substantial factor in any adverse employment actions. This was the proper legal standard. *See Pickering v. Board of Educ.*, 391 U.S. 563, 568-73 (1968); *Bausworth v. Hazelwood Sch. Dist.*, 986 F.2d 1197, 1198 (8th Cir. 1993). After careful review of the summary judgment record, we agree with the district court's conclusions and affirm the dismissal of Gumbhir's § 1983 claims.

IV. The Defamation Claim.

In 1992, Gumbhir refused to teach some of his assigned courses. The School of Pharmacy issued him a

letter of censure in December 1993, which became a basis for his state law claim of defamation. The district court dismissed this claim on the ground that dissemination of the letter within the UMKC community was not the requisite publication as that element of the tort was construed in *Rice v. Hodapp*, 919 S.W.2d 240, 243 (Mo. banc 1996) ("communications between officers of the same corporation in the due and regular course of the corporate business, or between different offices of the same corporation, are not publications to third persons").

Gumbhir argues the district court misapplied *Rice* because there is evidence the letter was distributed to the entire School of Pharmacy faculty, and "[d]efamatory statements made by company officers or supervisors to non-supervisory employees constitute a publication for purposes of a defamation action." *Rice*, 919 S.W.2d at 243. However, even assuming other faculty members were non-supervisory employees for purposes of this rule, Missouri courts recognize a qualified privilege, to be determined by the court as a matter of law, for a good faith communication "in which the person making the communication has an interest or in reference to which he has a duty, and to a person having a corresponding interest or duty." *Id.* at 244. Internal communications related to the solving of personnel problems are entitled to this privilege. *See Blake v. May Dept. Stores Co.*, 882 S.W.2d 688, 690 (Mo. App. 1994); *Lovelace v. Long John Silver's, Inc.*, 841 S.W.2d 682, 685 (Mo. App. 1992). Having reviewed the summary judgment record de novo, we conclude the district court correctly applied Rice. The dismissal of Gumbhir's defamation claim is affirmed.

V. The Award of Attorneys' Fees.

Gumbhir initially requested an award of $488,960.25 in attorneys' fees and $45,909.55 in costs. The district court advised that it would reduce this request because of limited success and invited Gumbhir to brief the issue further. Gumbhir then urged the court to award $458,263.57 in attorney's fees and $46,576.98 in costs. The court reduced the award to $110,000 in attorneys' fees and $15,000 in costs. The court cited four categories of unreasonable billing claims and also concluded that Gumbhir had achieved very limited success in the litigation because only three of nine claims survived summary judgment, retaliation was not his major claim, he received only a fraction of the compensatory damages sought and no punitive damages, and he was denied the wide-ranging equitable relief requested. Both sides appeal this ruling.

UMKC argues Gumbhir is entitled to no fee because of his "inexcusable behavior." We reject this attempt to reargue the adverse jury verdict on retaliation. Gumbhir was a "prevailing party" entitled to some fee. The question is how much. *See Warner v. Independent Sch. Dist. No. 625*, 134 F.3d 1333, 1336 (8th Cir.), *petition for cert. filed*, 66 U.S.L.W. 3800 (U.S. Jun. 4, 1998).

Gumbhir urges us to grant the fees and costs he requested. His amended fee petition was based upon attorney hours allegedly spent on the litigation and what he claimed were reasonable hourly rates, reduced by ten percent because of the district court's finding of limited success. "The most useful starting point for determining the amount of a reasonable fee is the number of hours

reasonably expended on the litigation multiplied by a reasonable hourly rate." *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983); *see City of Riverside v. Rivera*, 477 U.S. 561, 569 n. 4 (1986). In determining what hours were reasonably expended in this case, the district court properly examined whether particular claimed hours were unreasonable and the question of limited success. But it overlooked another aspect of reasonableness – the question whether the requested fee award when based upon hours allegedly expended exceeds the amount that could ever be reasonable for a case of this nature. This question is relevant because attorneys "should not be permitted to run up bills that are greatly disproportionate to the ultimate benefits that may be reasonably attainable." *Copeland v. Marshall*, 641 F.2d 880, 908 (D.C. Cir. 1980) (en banc) (MacKinnon, J., concurring).

In his closing argument to the jury, counsel for Gumbhir requested lost salary damages of $20,832 plus an unspecified amount for emotional distress. A lawyer who does not urge the jury to award a specific amount for emotional distress damages, and whose remaining claim for compensatory damages is $20,832, cannot expect that the jury will award substantial emotional distress damages. In other words, counsel knew from the outset that this case involved only a relatively modest claim for compensatory damages, perhaps $50,000 to $75,000 at most. It was not reasonable for an attorney to run up a bill of $450,000 to $500,000 to litigate this type of damage claim. We conclude that if the jury in this case has awarded Gumbhir the *full amount* he requested in closing argument, a reasonable fee could not have exceeded $110,000, the amount awarded by the district

court for Gumbhir's far more limited success.[1] This was not a case with broad civil rights implications. It was a damage action for injury suffered from a rancorous employment dispute that degenerated into unlawful racial or ethnic retaliation.

If an award of $110,000 would have been appropriate had Gumbhir been fully successful, the actual award must be substantially reduced because of his very limited success. "[T]he most critical factor in determining the reasonableness of a fee award is the degree of success obtained." *Farrar v. Hobby*, 506 U.S. 103, 114 (1992). Gumbhir did not succeed on his claims for institutional equitable relief. He prevailed on only one of his personal damage claims. The jury awarded him $4,423.20 of the $20,832 in quantifiable damages he requested, and the court awarded an additional $4,423.20 in the form of a prospective pay increase. Although pro rata fee reductions based upon the relationship between damages

---

[1] It might be argued that the case as framed by Gumbhir could not have been effectively litigated to a fully tried conclusion for this amount of attorney time. One response to that contention is that competent attorneys are adept at finding ways of litigating cases so that the time expended is reasonably related to the amount at issue. Another response is that of the court in *Scheriff v. Beck*, 452 F.Supp. 1254, 1261 (D. Colo. 1978):

> The dispute here is personal. The relatively small sums awarded by the jury indicate that in the general scheme of things, the affair was minor and should never have happened. Good sense among intelligent, if unfriendly, people should have prevailed. The argument should have been resolved within the community or in some forum other than the courts [and] that it did not is unfortunate.

requested and damages awarded are often inappropriate, we conclude that this approach is if anything a generous method of determining the appropriate reduction for limited success in this case. The total damages awarded Gumbhir were $8,846.40 or 42.5% of the lost salary damages he requested. Therefore, a reasonable attorneys' fee award cannot exceed 42.5% of $110,000, or $46,750.

The district court's attorneys' fee award is reduced to $46,750. As so modified, the judgment of the district court is affirmed, including its award of $15,000 in costs.

A true copy.

Attest.

CLERK U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 97-3066/3122/3832/4221/4369/4370WMKC

Askok K. Gumbhir, Dr.,	*	
Appellee/Cross-Appellant,	*	Appeal from the United States District
v.	*	Court for the
The Curators of the University of Missouri,	*	Western District of Missouri
Appellant/Cross-Appellee,	*	

After consideration of the court, appellee's motions for an award of costs pursuant to F.R.A.P. 39 and for an award of attorneys' fees are denied.

November 13, 1998

Order Entered at the Direction of the Court:

/s/ Michael E. Gans
Clerk, U.S. Court of Appeals, Eighth Circuit

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI WESTERN DIVISION

ASHOK K. GUMBHIR, Plaintiff,	)	
vs.	)	Case No. 95-0531-CV-W-3
CURATORS OF THE UNIVERSITY OF MISSOURI, et al., Defendants.	)	

FINAL ORDER GRANTING IN PART AND DENYING PART PLAINTIFF'S MOTION FOR EQUITABLE RELIEF, ATTORNEY FEES AND COSTS

(Filed Oct. 22, 1997)

On September 22, 1997, the Court issued an Order that, *inter alia*, required Plaintiff to "file suggestions as to how best to reduce the lodestar in order to reflect his limited success in this case." Order at 8. In order to provide Plaintiff a clearer picture as to the precise nature of his success, the Court provided an advance ruling with respect to his request for various forms of equitable relief. This is intended to be a final order that disposes of all of Plaintiff's post-verdict requests for relief.

I. EQUITABLE RELIEF

The matter of equitable relief was discussed in depth in the September 22 Order, and that discussion is incorporated as part of this Order. To summarize, all of Plaintiff's requests for equitable relief were denied except his

request for an increase in his annual salary. Plaintiff's annual salary is to be increased by $4,423.20 commencing from the date of the verdict.

II. ATTORNEY FEES AND COSTS

In its September 22 Order, the Court acknowledged that Plaintiff was a prevailing party at trial and was therefore to some award of attorney fees and costs. The Court acknowledged the many arguments raised by Defendants regarding Plaintiff's calculation of the lodestar, but deferred consideration of those issues until Plaintiff had an opportunity to make some effort to "discount" the lodestar based on his degree of success as suggested by cases including *Hensley v. Eckerhart*, 461 U.S. 424 (1983), *Parton v. GTE North, Inc.*, 971 F.2d 150 (8th Cir. 1992). *H.J. Inc. v. Flygt Corp.*, 925 F.2d 257 (8th Cir. 1991); and *Catlett v. Missouri Highway & Transp. Comm'n*, 828 F.2d 1260, 1270 (8th Cir. 1987).

With respect to the lodestar's calculation, the Court believes that there is some credence in many of Defendant's contentions. Specifically, the Court agrees that:

1. Time spent unsuccessfully attempting to seal portions of the record were easily calculable and should have been (but were not) left out of the lodestar's calculation.

2. Much attorney time was spent on clerical, secretarial or administrative matters that should have been billed at a lower rate than that normally associated with the particular attorney's normal rate for providing legal services.

3. Many entries are impossible to assess, as they state simply, for instance, "Telephone conference with" and the remainder of the entry has been redacted.

4. The Court believes the billing rate for Conway L. Hawn to be above the prevailing rate in this market for an attorney with his experience and background.[1]

The Court also believes that, once an appropriate lodestar is ascertained, a further reduction is necessary to reflect the degree of Plaintiff's success. Plaintiff's suggestion that he receive 90% of his award is untenable; his explanation fails to take into account that (1) retaliation was not his "major" claim; Plaintiff had a variety of "major" claims, of which only one was retaliation, (2) Plaintiff raised nine causes of action, of which only three survived summary judgment, (3) he received less than he sought in terms of compensation, and did not receive punitive damages as requested, and (4) he sought wide-ranging equitable relief, but received far less than he requested.[2]

---

[1] It is somewhat interesting to note that, to support his billing rate, Mr. Hawn's affidavit lists his work on *this* case as part of his experience. Obviously, his work on this case could not have been a factor in establishing his billing rate for this case.

[2] Interestingly, Plaintiff invites the Court to consider positions taken during settlement negotiations – despite his earlier insistence that Defendant acted improperly by raising the issue and the Court's clear declaration that it was not considering "the nature, conduct, or contents of settlement discussions." September 22, Order at 2 n.1.

After considering the issues outlined above, the Court concludes that an appropriate fee award is $110,000, an appropriate award of costs is $15,000.

II. CONCLUSION

In accordance with the above, it is hereby ordered that:

1. Defendant increase Plaintiff's annual salary by $4,423.20 commencing from the date of the verdict in this case.

2. Defendant shall pay Plaintiff the sum of one hundred ten thousand dollars ($110,000.00) for his attorney fees in this case.

3. Defendant shall pay Plaintiff the sum of fifteen thousand dollars ($15,000.00) for his costs incurred in this case.

4. In all other respects, Plaintiff's request for equitable relief is denied.

IT IS SO ORDERED.

/s/ Ortrie D. Smith
ORTRIE D. SMITH, JUDGE
UNITED STATES DISTRICT COURT

DATE 10/21/97

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI

ASHOK K. GUMBHIR,
Plaintiff,

v.

CURATORS OF THE UNIVERSITY OF MISSOURI, ET AL.,

JUDGMENT IN A CIVIL CASE

(Filed Oct. 22, 1997)

CASE NUMBER:
95-0531-CV-W-3

[ ] **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

[X] **Decision by Court.** This action came to trial or hearing before the Court. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED 1) Defendant increase Plaintiff's annual salary by $4,423.20 commencing from the date of the verdict in this case.

2. Defendant shall pay Plaintiff the sum of one hundred ten thousand dollars ($110,000.00) for his attorney fees in this case.

3. Defendant shall pay plaintiff the sum of fifteen thousand dollars ($15,000 00) for his costs incurred in this case.

4. In all other respects, Plaintiff's request for equitable relief is denied.

Entered On Oct. 22, 1997

October 22, 1997
Date

R.F. Connor
Clerk

/s/ Eva Will-Fees
(By) Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 97-3066/3122/3832/4221/4369/4370WMKC

Ashok K. Gumbhir, Dr.,	*	
Appellee,	*	Order Denying Petition
	*	for Rehearing and for
v.	*	Rehearing En Banc
	*	
Curators of the	*	
University of Missouri,	*	
	*	
Appellant,	*	

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

December 28, 1998

Order Entered at the Direction of the Court:

/s/ Michael E. Gans
Clerk, U.S. Court of Appeals, Eighth Circuit